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IN THE

Supreme Court of the United States

October Term, 1932

No. 784

C. N. BEVAN, *Appellant*,

vs.

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO, *Appellee*.

No. 785

JOHN W. KOHNMAN, *Appellant*,

vs.

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO, *Appellee*.

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ROBERT A. STRANAHAN, *Appellant*,

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Appeals from the Supreme Court of the State of Ohio

BRIEF IN BEHALF OF APPELLANTS

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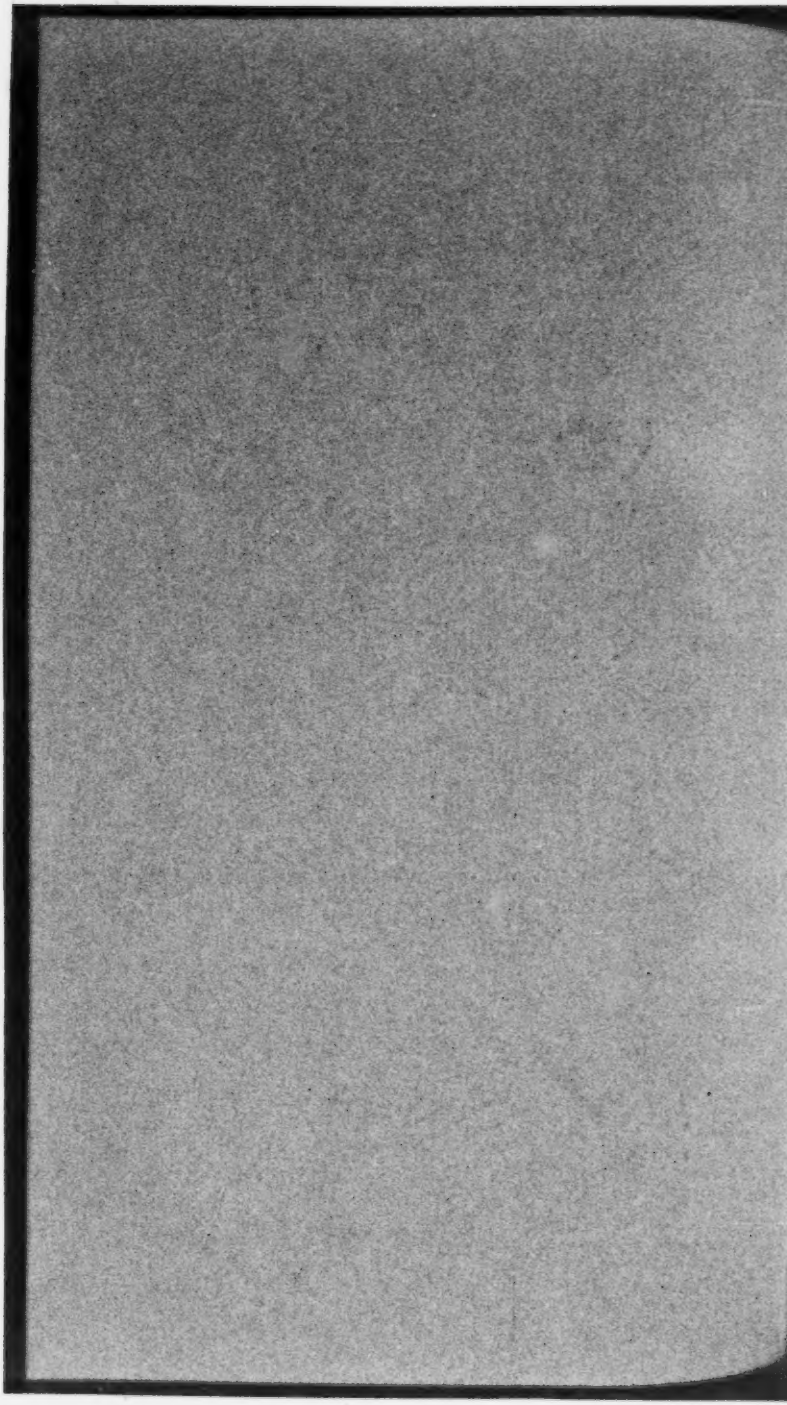

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BRIEF IN BEHALF OF APPELLANTS

I

THE OPINIONS OF THE COURTS BELOW

The opinion of the Supreme Court of Ohio, rendered on January 25, 1933, is reported in 126 Ohio St. 126, 184 N. E. 393. It is printed herein as Appendix A with bracketed paragraph numbers supplied.

The opinion of the Court of Appeals for Lucas County, Ohio, is not officially reported. It is unofficially reported in 12 Ohio Law Abstract 598, and is printed at page 133 of the *Bevan Record;* page 110 of the *Koehrman Record;* and page 108 of the *Stranahan Record.*

II

STATEMENT OF THE CASES

These suits involve the constitutionality under the due process clause of the Federal Constitution, of certain sections of the Ohio General Code, providing for the arrest and imprisonment of witnesses by order of a notary public for their failure or refusal to appear or to testify upon the taking of depositions in advance of trial for use in a civil action pending in a state court. The question presented has never been passed upon by this Court.

Under these sections, as construed by the Supreme Court of Ohio, the notary *should* require a witness to answer only questions and produce only documentary evidence which are "pertinent to the issues tendered or made" and "in cases and under circumstances where a party might heretofore have been compelled to produce the same by the ordinary rules of proceedings in chancery"; but the notary has the *power* to order the imprisonment of a witness for refusal to answer incompetent, irrelevant or immaterial questions and for the refusal to produce wholly incompetent, irrelevant or immaterial documentary evidence. The witness may disobey such order only at his peril. The notary public is not

vested with power or jurisdiction to hear and determine any questions as to the competency, relevancy or materiality of any evidence. He may, however, without determining any of these questions, order a witness to be committed to jail until he answers. No opportunity is afforded by the Ohio statutes for judicial review of any such order *prior to imprisonment.* It thus appears that the question as to whether a witness should be imprisoned is by the laws of Ohio left to the uncontrolled will of a ministerial or executive officer, who has no authority to determine what would be a proper exercise of his statutory power and whose decision to imprison or not to imprison depends upon nothing but his mere will.

The cases are actions in *habeas corpus,* engendered by the imprisonment of the respective appellants (the petitioners below) by the sheriff of Lucas County, Ohio, under an order of commitment for the petitioner Bevan (*Bevan,* 46)* and orders of attachment for the petitioners Koehrman and Stranahan (*Koehrman,* 45); *Stranahan,* 42), issued by a notary public, to the sheriff of Lucas County, in the course of an attempt to take depositions in a civil action between private individuals, pending in the Common Pleas Court of Lucas County (*Bevan,* 70; *Koehrman,* 48; *Stranahan,* 46).

A subpoena *duces tecum* was served upon the petitioner Bevan, as secretary-treasurer of The Woolson Spice Company (one of the defendants in the civil action) requiring the production of almost innumerable books, writings and records of the company (*Bevan,* 44). A subpoena *duces tecum* was likewise served upon

*Note: The three records are referred to by the respective names of the appellants.

the petitioner Koehrman (another of the defendants) also requiring the production of a large number of books and writings (*Koehrman*, 43). The drag-net character of these subpoenas *duces tecum* will be referred to later herein.

A subpoena was served upon the petitioner Stranahan, who was also one of the defendants in the civil action (*Stranahan*, 43).

Upon the taking of the depositions the petitioner Bevan refused to answer certain questions propounded and to produce the books or writings demanded (*Bevan*, 55-66). The taking of the deposition was adjourned, and in the absence of said petitioner, without notice to him or his counsel and without any hearing or opportunity therefor, at the request of the attorneys for the plaintiff in the civil action, the notary public signed and issued to the sheriff of Lucas County an order of commitment for this petitioner, which the attorneys had prepared for his signature. Although this order of commitment recites that the notary public "adjudged" that the evidence demanded was material and that he "ordered and adjudged" that Bevan be imprisoned, the notary himself testified that he did not "undertake to form a deliberate judgment upon the legal question as to whether the questions asked were material" and that he "simply signed the paper presented to him by counsel for the plaintiff" in the civil action (*Bevan*, 112; *Koehrman*, 89; *Stranahan*, 87.)

The petitioners Stranahan and Koehrman did not appear at the time desired by the attorneys for the plaintiff in the civil action but offered to appear when the examination of the petitioner Bevan had ended. With-

out anything further, separate orders of attachment were issued for them by the notary, directing the sheriff of Lucas County to attach these two petitioners and have each of them before the notary forthwith "as well to answer the State of Ohio for said contempt in disobeying said subpoena, as to give his testimony in the action * * *" (*Bevan*, 113; *Koehrman*, 90; *Stranahan*, 88).

The notary public's employment by plaintiff and her attorneys was not only as notary but also as stenographer. The continuance of his employment was at their pleasure and was upon such terms that his compensation depended entirely upon the amount of testimony which he could force the petitioners to give and the number of exhibits which he could require them to produce to be copied, so that he had a direct, substantial, personal, pecuniary interest in the taking of depositions, in the extent of oral examination and in dragging before him as many books and writings as possible (*Bevan*, 114; *Koehrman*, 91; *Stranahan*, 89).

The sheriff executed the orders of commitment and attachment by taking each of the petitioners into custody.

After being taken into custody, the petitioners severally brought *habeas corpus* actions in the Court of Appeals for Lucas County, Ohio, writs were issued, and the petitioners were admitted to bail pending hearing (*Bevan*, 37; *Koehrman*, 36; *Stranahan*, 36). Upon final hearing the Court of Appeals discharged the writs of *habeas corpus* theretofore issued, dismissed the petitions and remanded each of the petitioners to the custody of the sheriff (*Bevan*, 39; *Koehrman*, 38; *Stranahan*, 38). Separate proceedings in error were filed in the

Supreme Court of Ohio, which heard the cases together and which in a single opinion affirmed the lower court.

In ordering the commitment of the petitioner, Bevan, and the arrest and attachment of the petitioners, Koehrman and Stranahan, the notary public purported to act under Ohio General Code Sections 11510, 11511 and 11512, inclusive, printed at pages 13 and 14 of this brief.

III

SPECIFICATION OF THE ASSIGNED ERRORS WHICH ARE INTENDED TO BE URGED

1. The Supreme Court of Ohio erred in not holding that Ohio General Code Sections 11510, 11511 and 11512, and each of them, are in conflict with the provisions of the Fourteenth Amendment, in that they deprive appellants of their liberty and property without due process of law (Fourth assignment of errors; *Bevan*, 4; *Koehrman*, 4; *Stranahan*, 4), for the reasons that:

(a) Said sections as construed by the Supreme Court of Ohio *permit imprisonment to come before trial* in that they purport to authorize and empower a notary public in the course of the taking of depositions, at will to commit and imprison a witness (who under the law of Ohio may at his peril refuse to give evidence not pertinent to the issues made or tendered by the pleadings) for contempt in failing or refusing to appear and answer questions or produce documentary evidence, without conferring upon such notary public, or upon any judicial tribunal, the power judicially to hear and determine, before the commitment and imprisonment of the

witness, the question of the materiality, relevancy and competency of the evidence demanded and the consequent guilt or innocence of the witness of the alleged contempt, the only opportunity for a judicial hearing and determination of the guilt or innocence of the witness so imprisoned being an independent collateral action brought by the witness *after his imprisonment*, and in which he assumes the burden; and in that no opportunity is afforded by said sections, or by the law of Ohio, for submitting fundamental questions arising under the Federal Constitution and as to the jurisdiction of the notary public, to the determination of a competent judicial tribunal *before* the witness is declared to be guilty of contempt and imprisoned by the order of the notary public (Sixth assignment of error; *Bevan*, 5; *Koehrman*, 5; *Stranahan*, 4).

(b) Said sections attempt and purport to confer on notaries public arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to order or to refuse to order that questions propounded to witnesses be answered or that books and writings be produced, and to commit or refuse to commit as for contempt witnesses, who refuse to answer questions propounded to them and ordered to be answered by said notaries public or to produce books or writings ordered to be produced by said notaries public, without regard to the materiality, relevancy or competency of such questions or such books or writings (Tenth assignment of error; *Bevan* 7; *Koehrman*, 7; *Stranahan*, 7).

(c) Said sections attempt to confer upon notaries public, who, under the laws of Ohio, are mere ministerial

or executive officers vested with no power to hear and determine, the peculiarly and inherently judicial power to imprison summarily as for alleged contempt of them occurring in their presence (Eleventh assignment of error; *Bevan*, 7; *Koehrman*, 7; *Stranahan*, 7).

2. The Supreme Court of Ohio erred in not finding and adjudging that the operation of Ohio General Code Sections 11510, 11511 and 11512, and each of them, as applied to the facts in these cases, is in conflict with the provisions of the Fourteenth Amendment, in that no provision is made by said sections, or by the law of Ohio, for a hearing by the notary public, before whom depositions are being taken for use in a civil cause pending in a state court or by any judicial tribunal, before such notary finds and adjudges, or attempts to find and adjudge, a person to be guilty of contempt and commits such person to jail, or for a notice of such hearing to one charged with having been guilty of contempt, and no opportunity is afforded to persons so charged to appear and defend in person or by counsel; and in that said sections provide, or attempt to provide, that the notary public may commit these appellants for contempt, without notice of any hearing to them, and without providing or affording an opportunity for appellants to be present at a hearing and to defend in person or by counsel, before finding and adjudging appellants to be guilty of contempt and issuing an order of commitment confining them in the county jail of Lucas County, Ohio; and in that in the *Bevan* case the notary public did not in fact give said appellant any notice of any hearing, or afford him an opportunity to be present at a hearing and defend in person or by counsel, before finding and adjudging him to be guilty

of contempt and issuing an order of commitment confining him in the county jail of Lucas County (Seventh assignment of error; *Bevan*, 5; *Koehrman*, 5; *Stranahan*, 5); and in not finding and adjudging that the alleged or attempted adjudication by the notary in the *Bevan* case, that any questions propounded to him and any books, papers or documents ordered to be produced by him were material to any issue in the case in which it was attempted to take said depositions, and the alleged or attempted adjudication that the appellant Bevan was in contempt, and the issuing of an order of commitment, all in his absence and without notice to him or to his counsel, and without an opportunity for him first to know the charges against him or to have a hearing thereon, were in violation of said appellant's rights under the Fourteenth Amendment (Eighth assignment of error; *Bevan*, 6).

3. The Supreme Court of Ohio erred in finding and adjudging that Ohio General Code Section 11514, which provides that a witness imprisoned by an officer under Ohio General Code Sections 11510, 11511 and 11512, may, after being imprisoned, apply to a judge of the Supreme Court, Court of Appeals, Common Pleas or Probate Court, of Ohio, who may discharge such witness if it appears that his imprisonment is illegal, affords due process of law to the appellants, when committed by a notary public under said sections, and erred in not holding that said Sections 11510, 11511 and 11512 construed together with Section 11514, are in conflict with the provisions of the Fourteenth Amendment (Fifth assignment of error; *Bevan*, 4; *Koehrman*, 4; *Stranahan*, 4).

4. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511 and 11512, and each of them, and the operation of said sections and each of them, as applied to the facts in these cases do not deny appellants due process of law and are not repugnant to the Fourteenth Amendment, in that as construed by the Supreme Court of Ohio, said sections purport to authorize and permit the commitment and imprisonment of appellants by a notary public who, as was the fact in these cases, was selected and employed by, and the continuance of whose employment was at the will of, the party seeking to take depositions for use in a civil action pending in a state court, the said notary public's compensation being by law directly governed by the extent of the evidence the witnesses (these appellants) might be required to give, and the said notary public having a direct, substantial, personal pecuniary interest in the taking of the deposition and in coercing the witnesses (these appellants) to testify; and in that the said notary public was thereby disqualified from determining whether these appellants were guilty of contempt for failing or refusing to give the evidence demanded and disqualified from ordering appellants' commitment (Twelfth assignment of error; *Bevan*, 8; *Koehrman*, 8; *Stranahan*, 7); and further in not finding and adjudging that on the facts in these cases the notary public was disqualified and without jurisdiction so to act for the reasons above set forth, and that therefore said notary public's acts in adjudging and bringing about the appellants' imprisonment were a denial of due process of law in violation of the Fourteenth Amendment (Thirteenth assignment of error; *Bevan*, 8; *Koehrman*, 8; *Stranahan*, 8).

5. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11497, 11503, 11510, 11511 and 11512, and each of them, and the operation of such sections and each of them, as applied to the facts in the *Bevan* and *Koehrman* cases are in conflict with the Fourteenth Amendment, in that they deprive said appellants of security in their person, papers and possessions, and subject them to unreasonable search and seizure (*Bevan* case, Fourteenth assignment of error, *Bevan*, 9; *Koehrman* case, Fourteenth assignment of error, *Koehrman*, 9).

IV

ARGUMENT

1. THE OHIO STATUTES AS CONSTRUED BY THE SUPREME COURT OF OHIO

A. Sections Of The Ohio General Code Involved

Although only Ohio General Code Sections 11510, 11511 and 11512 are directly attacked before this court, it is necessary to set forth other sections in order to view the legislative scheme for taking depositions in advance of trial in connection with civil suits in the courts of Ohio.

Section 11526* relates generally to testimony by deposition. This section reads:

> Sec. 11526. "Either party may commence taking testimony by deposition at any time after service upon the defendant."

*Note: All the sections here referred to are sections of the Ohio General Code.

Koehrman and Stranahan as defendants in the Common Pleas action, and Bevan, as an officer of The Woolson Spice Company, also a defendant in the Common Pleas action, were ordered to appear to be examined as if under cross examination (Koehrman and Bevan being also ordered to produce certain books and writings), under the provisions of Section 11497, which provides as follows:

> Sec. 11497. "At the instance of the adverse party, a party may be examined as if under cross examination, either orally, or by deposition, like any other witness. If the party be a corporation, any or all the officers thereof may be so examined at the instance of the adverse party. The party calling for such examination shall not thereby be concluded but may rebut it by counter testimony."

Section 11529 specifies the officers authorized to take depositions:

> Sec. 11529. "Depositions may be taken in this state before a judge or the clerk of the supreme court, a judge or clerk of the court of appeals, a judge or clerk of the court of common pleas, a probate judge, justice of the peace, notary public, mayor, master commissioner, official stenographer of any court in this state, or any person empowered by a special commission."

Section 11502 (not necessary here to be quoted) authorizes the issuance of a subpoena by an officer authorized to take depositions.

Section 11503, relating to the production of books and records, is as follows:

> Sec. 11503. "A subpoena shall be directed to a person named therein, and require him to attend at a specified time and place to testify as a wit-

> ness. It also may direct the person it names, to bring with him any book, writing, or other thing under his control, *which he may be compelled to produce as evidence.*" (Italics ours.)

Section 11537 is a statutory recognition of the custom that the notary before whom the deposition is taken acts also as a stenographer and transcribes the testimony:

> "Sec. 11537. "The deposition must be written in the presence of the officer before whom it is taken, either by the officer, the witness, or some disinterested person, and subscribed by the witness."

The sections directly under attack in this court, relating to the power of the notary to commit the witness for contempt, are as follows:

> Sec. 11510. "Disobedience of a subpoena, a refusal to be sworn, except upon failure to pay fees duly demanded, and *an unlawful refusal to answer* as a witness or to subscribe a deposition, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required." (Italics ours.)

> Sec. 11511. "When a witness fails to obey a subpoena personally served, the court or officer, before whom his attendance is required, may issue to the sheriff, coroner, or a constable of the county, an attachment, commanding him to arrest and bring the person named therein before such court or officer at the time and place the writ fixes, to give his testimony and answer for the contempt. But if it does not require the witness to be immediately brought, he may give a bond for a sum fixed, with surety, for his appearance, which sum shall be indorsed on the back of the writ, except

that, if no sum be so indorsed, it shall be one hundred dollars. When the witness was not personally served, the court, by a rule, may order him to show cause why an attachment should not issue against him."

Sec. 11512. "Punishment for the acts of contempt specified in section eleven thousand five hundred and ten shall be as follows: When the witness fails to attend in obedience to a subpoena, the court or officer may fine him not over fifty dollars; in other cases, not more than fifty dollars nor less than five dollars; or he may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition."

There is no statutory provision requiring or permitting any judicial review of a notary's order of imprisonment *prior* to its execution.

Section 11514 relates to discharge only *after* imprisonment on the order of a notary public:

Sec. 11514. "A witness *so imprisoned* by an officer may apply to a judge of the supreme court, court of appeals, common pleas or probate court, who may discharge him, if it appears that his imprisonment is illegal." (Italics ours.)

B. Decisions Of The Supreme Court Of Ohio

The operation and effect of these statutes as construed in the decisions of the Supreme Court of Ohio will now be discussed.

The notary in committing Bevan for his refusal to answer questions and to produce books and writings was acting in exercise of the power purported to be conferred upon him by Sections 11510 and 11512 to punish as a

contempt of him "an unlawful refusal to answer as a witness (Sec. 11510)" by imprisonment in the county jail "there to remain until he submits to be sworn, testifies, or gives his deposition (Sec. 11512)."

Petitioners Koehrman and Bevan were taken into custody upon attachments issued by the notary pursuant to Section 11511 to bring each of them before the notary "to give his testimony and answer for the contempt" in disobeying the subpoena of the notary (Sec. 11511), who was empowered summarily to punish the "disobedience of a subpoena" as a contempt of him (Sec. 11510) by fine or imprisonment (Sec. 11512).

An adequate view of the operation and effect of the state statutes, as interpreted by the Supreme Court of Ohio, requires consideration of the decision in the instant case together with five earlier decisions involving these statutes by the same court.

It will be convenient at the beginning to state the effect of these decisions, leaving a statement of the cases to follow.

The operation and effect of the statutes in question under the decisions of the Supreme Court of Ohio are as follows:

1. Sections 11497 and 11503 authorize the compulsion from a witness called for examination by deposition before a notary public, *of only such evidence as is competent and relevant to the issues made or tendered by the pleadings in the action in which the deposition is being taken. Ex Parte Jennings*, 60 Ohio St. 319, 54 N. E. 262 (1899); *Ex Parte Schoepf*, 74 Ohio St. 1, 77 N. E. 276 (1906).

2. As a corollary to proposition (1) above, a witness called for examination before a notary public under Section 11497, may lawfully refuse to answer a question or to produce a document or writing that is incompetent or irrelevant, and his refusal to obey the order of the notary public constitutes a contempt for "*an unlawful refusal to answer*" within the meaning of Section 11510 *only if the order calls for the production of evidence that is competent and relevant. Ex Parte Jennings, supra; Ex Parte Schoepf, supra.*

3. Notwithstanding that by statute the witness is privileged from being compelled to produce evidence that is incompetent or irrelevant, and the statute sanctions punishment as for contempt only for a refusal to obey an order to produce evidence that is competent and relevant, yet *the notary public has no power to hear and determine the question of the competency or relevancy of the evidence sought to be elicited, in connection with and as determinative of, the question whether the witness has committed the offense of contempt as defined by statute. DeCamp vs. Archibald,* 50 O. S. 618, 35 N. E. 1056 (1893); *Ex Parte Jennings, supra; In re Raub,* 65 O. S. 128, 61 N. E. 701 (1901); *Ex Parte Schoepf, supra.*

4. If the witness refuses to answer upon the ground that the answer is incompetent or irrelevant he does so at his own peril, for the notary public may summarily commit him as for contempt, if indeed it is not the duty of the notary public so to do upon the request of the adverse party, without affording an opportunity for hearing on, and without making any determination of, and without power in the notary public *at any time,* or

in any judicial tribunal *before* imprisonment of the witness, to hear and determine, the question whether the evidence demanded is competent and relevant and whether the witness has committed the offense charged. See cases cited at paragraph 3 above, and *Ex Parte Bevan* (instant case) at Appendix A herein.

5. A witness summarily committed as for contempt by a notary public without hearing or determination must either submit to imprisonment or assume the burden of instituting proceedings before a court or judge under Section 11514 (or by *habeas corpus* if the proceeding under Section 11514 be not *habeas corpus*) for discharge from custody. The act of the notary public, being conclusive unless the witness initiates a separate proceeding, has the finality of and the same force and effect as a judgment of a court of general jurisdiction. See cases cited at paragraph 3 above, and *Ex Parte Bevan* (Appendix A).

The cases above cited will next be reviewed in sequence of date, leaving to the last a more extended review of the opinion of the Ohio Supreme Court in the instant case (Appendix A).

In this connection it is to be noted that Section 11510, which provides that "an unlawful refusal to answer as a witness" may be punished as a contempt, was formerly Section 5252 of the Revised Statutes of Ohio which provided that "a refusal to answer as a witness * * * when lawfully ordered" might be punished as a contempt. This change in phraseology was introduced in the codification of the laws of Ohio of 1910, and subsequent decisions of the Ohio courts recognize no distinction in substance.

All the cases above cited were proceedings in *habeas corpus* to discharge from custody a witness who had been committed by a notary public upon refusal to obey the order of the notary public to answer questions or produce documents. In each case the court determined the competency and relevancy of the evidence sought to be adduced, and in *Ex Parte Jennings, supra,* and *Ex Parte Schoepf, supra,* the court discharged the witness from custody upon finding that the questions ordered to be answered or the documents ordered to be produced were incompetent or irrelevant.

In *DeCamp vs. Archibald, supra,* the syllabus, which under Rule VI of the Supreme Court of Ohio states the points of law decided, is in part as follows:

> "2. The power conferred by sections 5252 and 5254, Revised Statutes (General Code Sections 11510 and 11512), on a notary, or other officer, in taking depositions, to commit a witness to the jail of the county for refusing to answer a question, is not judicial in the sense of the constitution, conferring all judicial power upon the courts of the state.
>
> "3. Where the question propounded involves no question of privilege on the part of the witness, it is his duty to answer, if ordered by the notary to do so. The question of its competency is a matter for the determination of the court on the trial of the action in which the evidence is taken; and if he refuses to do so, when ordered, he may be committed as a contumacious witness."

In the discussion concerning the constitutionality of these statutes under the State Constitution the court said (P. 626):

> "* * * Any abuse is carefully guarded against, by the power given any judge by § 5255, Revised

Statutes (General Code Section 11514), on application of the witness, to discharge him if he find the imprisonment to be illegal."

In *Ex Parte Jennings, supra,* the syllabus is as follows:

"A witness whose deposition is being taken before an officer may refuse to testify to facts not relevant to the issues in the case in which the deposition is to be read, if the disclosure of such irrelevant facts would be injurious to the business of the witness; and, if imprisoned by the officer for such refusal, he may be discharged on *habeas corpus.*"

In the opinion it was said by Shauck, J. (Pp. 328-331):

"* * * *The language of the section conferring authority upon the officer to punish a witness for refusing to answer 'when lawfully ordered' implies that punishment cannot be imposed for every refusal.* (P. 328.)

"It is familiar that *an objection to the competency of the evidence to be elicited, when interposed by a party to the action in which the deposition is taken, cannot be either sustained or overruled by the officer.* In such case the question of competency is for the court. But it seems quite consistent with the purpose for which depositions are taken that *a witness may refuse to make disclosures which would operate to his personal prejudice without aiding the court in determining the rights of the parties, by reflecting either upon the issues in the case or upon the credibility of the witness.* * * *

"* * * In *DeCamp v. Archibald,* so confidently relied upon to justify this imprisonment, it was clearly pointed out in the opinion that the question which the witness refused to answer was com-

petent. *Indeed it does not seem to have been finally determined in any case that the personal liberty of the citizen is of so little importance that it should yield to a desire to gather food for idle gossip.*" (Pp. 328, 329, 330.) (Italics ours.)

* * * * *

"We do not suppose that any interest which the witness may have in concealing the facts which the question propounded was designed to elicit would excuse him from answering, if the facts were relevant to the issues in the case on trial; nor that the sincerity of his belief that the facts are irrelevant would shield him from imprisonment if the court should be of the opinion that they are relevant. *If he refuses to answer upon the ground that the answer is incompetent he does so at his own peril.* It seems, however, entirely clear that in this case the opinion of the witness as to the irrelevancy of the question is correct." (P. 331.) (Italics ours.)

In *In re Rauh, supra,* the court said at page 135:

"* * * Whether or not the substance of the deposition is incompetent, is to be left to the subsequent determination of the court; as is also the question whether a command to produce books, papers or other thing under the control of the witness relates to such books, writings or other thing as he may be compelled to produce. If the witness assumes to decide these questions for himself at the time, unless the interrogatory involves a question of privilege, he must do so at his peril. If he should be right in his decision he would lose nothing; if wrong, he must suffer the consequences."

This amounts to saying that whether he is right or wrong he must go to prison. If he can employ counsel and convince a court that he is right he will get out of prison—but it hardly seems correct to say that he has lost nothing in such case.

In *Ex Parte Schoepf, supra,* the syllabus of the case reads in part as follows:

> "4. While an officer before whom a deposition is being taken is empowered to punish as for contempt any person who refuses to obey an order to answer a question or to produce a document, he cannot do so unless it is so 'lawfully ordered'; and where such question or document is not pertinent to the issues tendered or made, or is not material or necessary to make out the case of the party calling for it, or is incompetent or privileged, the witness cannot lawfully be ordered to answer such question or to produce such document."

That case interprets Sections 11503 and 11551 to limit the authority of the notary to order the production of only such books and records as contain evidence pertinent to the issues and material and necessary to make out the case of the adverse party. Thus it is stated in the syllabus of that case:

> "1. The clause in section 5247, Revised Statutes (General Code Section 11503), 'which he may be compelled to produce as evidence,' and as used in *In re Rauh*, 65 Ohio St. 128, must be construed with section 5289, Revised Statutes (General Code Section 11551), and is therefore limited to evidence pertinent to the issue, in cases and under circumstances where a party might heretofore have been compelled to produce the same by the ordinary rules of proceeding in chancery.
>
> "2. The rule in chancery as to compelling the production of documents for the purpose of evidence and inspection was and is that a party is entitled to a discovery of such facts or documents in his adversary's possession or under his control, as are material and necessary to make out his own case; but that this right does not extend to a discovery of the manner in which the adverse party's case is to be established, nor to evidence which relates exclusively to the adverse party's case."

In the opinion of that case it was said:

> "It was clearly pointed out in *Ex Parte Jennings*, 60 Ohio St. 319, that *neither the officer who takes a deposition nor the court on the trial of the case, has power to punish a witness for disobedience of a subpoena or a refusal to answer except when the witness has been 'lawfully ordered.'* Section 5252, Revised Statutes (General Code Section 11510). And in that case and the *Rauh* case also it was said that when the witness undertakes to decide upon the question whether he has been 'lawfully ordered' he does so at his own peril. *It is the same whether a question of privilege is involved or whether it is only a matter of incompetent or irrelevant evidence.* * * * Accordingly it was nowhere said in either of the decisions of this court already referred to, nor was it intended to be inferred, that a witness might be compelled to surrender to his adversary a coveted document, before the right to compel production of it had been submitted to the judgment of a competent tribunal; but the correlative proposition that a witness might take the chances of being sustained on a refusal to answer an incompetent or irrelevant question was distinctly asserted. It would seem, therefore, that the power of a notary public in the taking of depositions and the limitations imposed thereon have been clearly defined by the statutes and the previous decisions of this court." (Pp. 10, 11.)
>
> "* * * Yet counsel still insist that the witness may be compelled by imprisonment to disclose facts which they admit could not be admissible on the trial. From what we have already said it results that the notary public had no such power * * *." (P. 11.)
>
> * * * * *"

It seems clear that in speaking of the "power" of the notary to punish for contempt the court meant power

sustainable in the courts as distinguished from power to commit a witness to prison there to stay until such witness by an independent proceeding in a court can secure his release by judicial process. The latter "power" is just what all of the decisions show he does have regardless of the relevancy or competency of the evidence sought to be elicited.

Benckenstein vs. Schott, 92 O. S. 29, 110 N. E. 633 (1915), held Sections 11510 and 11512, empowering a notary to commit a witness for refusal to testify, to be constitutional and to afford due process under the Federal Constitution. The ground of the decision appears in the following quotation from the opinion:

> "* * * In the case at bar, when plaintiffs in error perform the act required of them, the commitment is at an end, or, under the provisions of Section 11514, they have the right to apply to a judge, who may discharge them if it appears that the imprisonment is illegal.
>
> "It is said by the supreme court of the United States that due process of law has never been precisely defined, but it does not require a plenary suit or a trial by jury, nor is it necessarily judicial procedure. In *Iowa Central Ry. Co. v. Iowa*, 160 U. S., 389, it is held: 'The fourteenth amendment to the constitution in no way undertakes to control the power of a state to determine by what process legal rights may be asserted, or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and affords fair opportunity to be heard, before the issues are decided.' We think these requirements are met by the procedure provided in the statutes under consideration, and we are unable to say that there has been a failure of due process of law in the proceeding which is challenged by plaintiffs in error." (Pp. 41, 42.)

In the review which follows of the opinion of the Ohio Supreme Court in the instant case, *Ex Parte Bevan,* reference will be made to the bracketed paragraph numbers supplied by us in Appendix A.

After discussing the facts of the instant cases [17] to [24] and the statutory method for appointment of notaries public [25] and [26], the court said:

> [27] "Can it be said that the Legislature has no authority to delegate the power to commit to a notary public, notwithstanding his fitness, *just because he has no power to 'hear and determine'?*" (Italics supplied.)

The court then turned to the subject of the separation of the legislative, executive and judicial functions of government [28] and [29], stated that a notary public is a ministerial or an executive officer [30], and concluded that the power to commit delegated to him is not a judicial function [31], a conclusion rested on previous decisions of the same court [48] and fortified by the fact that such power "is so circumscribed by legislative enactment that there is little room remaining within which to exercise the only judicial function, * * * whether he will or will not commit [31]." In fact, the court inclined to the view that the provisions of Section 11512 that the notary "may fine" or "may imprison" for disobedience of the order of a subpoena or refusal to testify, *are mandatory,* so that, if the adverse party conducting the examination requested the notary public to imprison the witness upon his refusal to answer some question or produce some document, and the notary declined to accede to this request (supposedly for any reason thought proper by the notary public if he

should arrogate any discretion to himself, *e. g.*, that the question was grossly irrelevant or frivolous), mandamus would issue to compel the notary public to fine or commit the witness [32] to [37]; but the court said that it was not necessary to hold that section to be a mandatory statute in this case (presumably for the reason that the notary public in this case did exercise his power of coercion on request of the adverse party) [38].

The court next passed on issues raised in the state courts as to the competency of the testimony demanded and various points of procedure under the state law [39] to [45], questions which are not before this Court. There then follow the conclusions of the court on the subject of due process of law under the federal constitution, as follows:

> [46]. "The contention that the notary who committed the relators was disqualified because of interest is not tenable, and does not come within the purview of *Tumey v. Ohio*, 273 U. S., 510, 47 S. Ct., 437, 71 L. Ed., 749, 50 A. L. R., 1243."
>
> [47]. "The review of the action of the notary in committing relators as provided by Section 11514, General Code, afforded them due process. In addition, the right and opportunity to object to any and all testimony taken by the notary, as being irrelevant, incompetent, or privileged, was preserved to them in the trial court, and they had due process of law."
>
> * * * * *
>
> [49]. "These cases [*DeCamp vs. Archibald*, 50 Ohio St. 618, 35 N. E. 1056, 40 Am. St. Rep. 692; *Benckenstein vs. Schott, Sheriff*, 92 Ohio St. 29, 110 N. E. 633] are likewise sufficient answer to the claim that Sections 11510, 11511 and 11512, General Code, are violative of the state and federal constitutions in denying due process of law."

It is thus to be seen that the Ohio Supreme Court in the instant case expressly acknowledged ([27] quoted above) that the notary public has no power to hear and determine the competency or relevancy of testimony sought to be compelled. In this respect the court followed its holding in the prior cases of *DeCamp vs. Archibald, supra; Ex Parte Jennings, supra; In re Rauh, supra;* and *Ex Parte Schoepf, supra,* that a witness who undertakes to decide upon the question whether his refusal to answer would constitute a contempt as "an unlawful refusal to answer (Sec. 11510)," does so at his own peril, for he may be summarily committed for contempt by the notary public under Section 11510, notwithstanding that the notary public has no power to hear and determine whether the question asked was competent or relevant and hence whether such refusal was "an unlawful refusal to answer (Sec. 11510)" and in fact a contempt.

Moreover, the conclusion that the notary public has no power to hear and determine the subject matter of the offense of contempt, though possessing arbitrary power of commitment for such offense, is impelled from the facts on which rests the decision of the Ohio Supreme Court in the instant case (*Ex Parte Bevan*). It appears explicitly in the record of these proceedings that the notary public held no hearing and gave no consideration on his part to the question whether the documents ordered to be produced and the questions ordered to be answered were material and relevant to the issues. The following is quoted from the examination of the notary public (*Bevan*, 112; *Kochrman*, 89; *Stranahan*, 87):

"Mr. Welles: Your commitment further reads: 'The undersigned, a notary public, adjudges that said questions and said books, papers and documents therein referred to are material to the issues in said cause as appears from the petition filed herein, copy of which is hereto attached and marked Exhibit A'; did you in fact hold any hearing, hear any arguments, give counsel for Mr. Bevan or for the defendants in the Woolson case any opportunity to be heard by you on the question as to whether these documents or questions were material to the issues? A. No, sir.

Q. Did you in fact even read the petition in the Woolson Spice case? A. Yes, sir.

Q. Are you a lawyer? A. No, sir.

Q. Did you undertake to form a deliberate judgment upon the legal question as to whether the questions asked were material to the issues raised by the petition in the Woolson case? A. No, sir.

Q. You simply signed the paper presented to you by counsel for the plaintiff in that case, is that right? A. Yes, sir."

The conclusion of the Ohio Supreme Court in the instant case that the statutes afford due process of law under the Federal Constitution was placed expressly on the right of the witness under Section 11514, *after his imprisonment on the order of an officer having no jurisdiction to hear and determine the subject matter of the offense for which the witness was committed,* to apply to a judge of a state court for discharge from imprisonment, at which time the imprisoned witness is afforded his first opportunity for a hearing on and determination of the question whether his refusal to answer was in fact a contempt of the notary as an "unlawful refusal" (Sec. 11510); and hence whether his imprisonment is

illegal (Sec. 11514). See paragraph [47] of the opinion set forth above. This conclusion follows the same view expressed in *DeCamp vs. Archibald, supra,* and *Benckenstein vs. Schott, supra.*

In other words, the Supreme Court of Ohio holds not that the proceeding before the notary public resulting in imprisonment of the witness for contempt affords due process of law, but that the privilege accorded to the witness on his initiative of subsequently instituting proceedings for discharge from imprisonment under Section 11514 suffices for due process of law under the Federal Constitution.

2. THE OHIO STATUTES AS CONSTRUED BY THE SUPREME COURT OF OHIO ARE IN CONFLICT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION

As hereinbefore demonstrated, the notary has no power or jurisdiction to hear and determine the guilt or innocence of a witness charged with contempt and whatever power he has is purely personal, absolute, despotic and arbitrary, exercised without any of the limitations of judicial process. Having no jurisdiction and being unable to pass upon the question of the guilt or innocence of the person appearing before him, he does not and cannot afford such person an opportunity to be heard on the charge against him. Notice as a requisite of due process imports an opportunity to defend, without which the notice is a mere sham and had better be omitted altogether. Thus the proceeding before the notary lacks the

three prime essentials of due process, namely, notice and opportunity to be heard, before a court or officer of competent jurisdiction, before condemnation.

The inquiry whether a witness has committed contempt of a notary, involves questions of law as well as of fact, since by statute the notary should punish only *an unlawful refusal*. The determination of that inquiry involves a judicial determination, which, in the language of Chief Justice Bigelow in *Denny vs. Mattoon & others*, 2 Allen (Mass.) 361, 380, 79 Am. Dec. 784 (1861), "is not to be settled arbitrarily or capriciously, but by the application of fixed rules and established principles to facts which may be proved. * * * it must be the result of due inquiry sufficient to satisfy the discretion and convince the judgment of the officer of the law, in whom the authority and jurisdiction to decide the question have been duly vested."

We do not find it necessary to maintain that a notary would be incompetent to receive a grant of judicial power from the legislature of Ohio. It is plain from the Ohio statutes and decisions that he has received no grant of such power. Neither do the principles we assert as to the requisites of due process of law touch upon the doctrine of distribution of governmental powers and functions among the legislative, executive and judicial departments. While we shall concede that the Federal Constitution imposes no necessity for maintaining the division of the powers of a state government into its separate branches, still the requirements of due process do not permit depriving one of his constitutional guarantee of a judicial hearing and determination of his personal right of liberty before some tribunal, whether an officer, board,

court or by whatever name called, authorized to hear and determine and proceeding to the exercise of the judicial power invested in it by the judicial process of notice, hearing and deliberation.

In proceeding to exercise the power of commitment, the notary has before him none of the pleadings in the action, and, except for any casual extra-official information he may fortuitously possess, he is altogether ignorant of the nature of the action and the issues made and the rights of the parties and is provided by law with none of the information necessary to determine the question upon which his jurisdiction impinges. He holds no hearing, receives no evidence, makes no record, determines no facts and applies no law, may proceed in the absence of the party charged, is not equipped and is incompetent by law to make any determination and makes none, proceeds to commit and imprison in an *ex parte* proceeding by personal fiat at the control solely of the adverse party. And the person against whom he proceeds must either submit to continued imprisonment or take upon himself the burden of instituting an independent proceeding for his discharge. The notary need not in fact, even reach any conclusion, uninformed as it would be, that the evidence demanded is relevant or material, or that the witness' refusal is unlawful, and in the *Bevan* case confessedly made no attempt to do so.

If, as intimated by the Supreme Court of Ohio (*Ex Parte Bevan*, Appendix A, pars. 32 to 37), the statutes impose on the notary a mandatory duty to commit whenever requested by counsel, then the notary is, in law as well as in fact, a mere puppet; and the real power of commitment is entrusted to private litigants, through their attorneys.

A. Due Process Requires Notice And An Opportunity To Be Heard Before A Tribunal Empowered To Hear And Determine And Having Jurisdiction Of The Subject Matter

Due process of law requires notice and opportunity to be heard by a court having jurisdiction of the subject matter. *Pennoyer vs. Neff*, 95 U. S. 714, 732, 733 (1877); *Hurtado vs. California*, 110 U. S. 516, 535, 546 (1884); *Foster vs. Kansas*, 112 U. S. 201, 206 (1884); *Louisville Trust Co. vs. Comingor*, 184 U. S. 18 (1902); *Twining vs. New Jersey*, 211 U. S. 78, 110 (1908); *Coe vs. Armour Fertilizer Works*, 237 U. S. 413, 423-425 (1915).

In *Twining vs. New Jersey*, this Court said at pages 110 and 111:

> "* * * Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, *Pennoyer v. Neff*, 95 U. S. 714, 733; *Scott v. McNeal*, 154 U. S. 34; *Old Wayne Life Association v. McDonough*, 204 U. S. 8, and that there shall be notice and opportunity for hearing given the parties. *Hovey v. Elliott*, 167 U. S. 409; *Roller v. Holly*, 176 U. S. 398; and see *Londoner v. Denver*, 210 U. S. 373."

Jurisdiction to pass upon the subject matter is essential for due process. *Pennoyer vs. Neff, supra* (95 U. S. 714), p. 733:

> "Whatever difficulty may be experienced in giving to those terms (due process of law) a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings ac-

> cording to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. *To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit.*" (Italics ours.)

Due process hears before it condemns and calls for "the deliberation and judgment of the court." *Hurtado vs. California, supra* (110 U. S. 516); *New Orleans Waterworks Co. vs. Louisiana,* 185 U. S. 336, 350 (1902).

In the case first cited, Mr. Justice Mathews said at page 535:

> "Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' * * *."

B. Notice Imports An Opportunity To Defend, And A Denial Of The Benefit Of Notice Is In Effect A Denial Of Notice

Reasonable opportunity to be heard is just as necessary as reasonable notice. *Londoner vs. Denver,* 210 U. S. 373, 386 (1908):

> "If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the

board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal."

Notice imports an opportunity to defend. In *Hovey vs. Elliott,* 167 U. S. 409, 415 (1897), it was said:

> "But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. *A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether.* It would be like saying to a party, appear and you shall be heard; and, when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard." (Italics ours.)

C. Appearance Before The Notary For Examination Will Not Authorize Commitment Without Notice Of The Charge Of Contempt And Opportunity To Defend

Appearance before the notary for examination will not authorize commitment for contempt without notice of the charge and opportunity to defend.

in *Hovey vs. Elliott, supra* (167 U. S. 409), it was held:

> "A court possessing plenary power to punish for contempt, unlimited by statute, has not the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court."

This court said further (p. 417):

> "Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice courts possess the right to inflict the very wrongs which they were created to prevent."

In the case of *In re Rosser*, 101 Fed. 562 (C. C. A., 8th, 1900), the defendant had been cited to appear for examination. He had no knowledge that the examination would be used to obtain an order respecting some of his

property. After the examination the referee, without notice to him and without giving him an opportunity to be heard, entered an order directing him to pay over certain money which he held. He refused and was committed to jail for contempt. The court said (p. 567):

> "* * * It (due process of law) must give him notice of the charge or claim against him and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him and of the relief sought from the court if the claim is sustained. And the opportunity to be heard must be such that he may, if he chooses, cross-examine the witnesses produced to sustain the claim, and produce witnesses to refute it, if a question of fact is in issue, and, if a question of law is presented, the opportunity to be heard must be such that his counsel may, if they desire, argue the justice and propriety of the judgment or order proposed. Judicial orders or judgments affecting the lives or property of citizens in the absence of such a notice and opportunity to the party affected are violative of the fundamental principle of our laws and cannot be sustained." (Citing cases.)

So, too, the notary has not the right to attach a person for contempt in refusing to appear before him and testify, when if he had appeared and refused to testify the notary could not have legally exercised the power.

D. Provision For Relief After Imprisonment On The Void Order Of The Notary Does Not Afford Due Process

Ohio General Code Section 11514, which in terms provides for relief after commitment by the notary, can

not validate the void orders of the notary. Provision for relief after judgment or commitment is not sufficient to satisfy due process. *Coe vs. Armour Fertilizer Works, supra* (237 U. S. 413, 423, 424); *Pennoyer vs. Neff, supra* (95 U. S. 714, 728); *Meyers et al. vs. Shields,* 61 Fed. 713, 724 (C. C., N. D. Ohio, 1894). As suggested by the Circuit Court of Appeals for the Third Circuit in *Nottebaum et al. vs. Leckie et al.,* 31 Fed. (2d) 556, 561 (C. C. A. 3d, 1929), a vain attempt to undo a wrong of the kind here involved cannot be so coupled with the proceeding as to make lawful that which before was wholly unlawful.

In *Coe vs. Armour Fertilizer Works, supra* (237 U. S. 413), a Florida statute which provided in substance that after execution against a corporation had been returned "no property," an execution might issue against a stockholder for the same debt to be enforced against his property to the extent of his unpaid subscription as the same appeared on the books of the corporation without notice to such stockholder or other preliminary step, was held by this Court to be repugnant to the due process clause of the Fourteenth Amendment notwithstanding that the statute provided two independent remedies for relief against the execution if invalid; the one a stay of execution by proceedings before the sheriff upon the filing of an affidavit of illegality and giving bond; the other a stay upon motion by the court before which the execution was returnable.

The Supreme Court of Florida had held the statute to be constitutional, and had affirmed a judgment denying a motion to quash the execution, on the ground that Coe in fact had no defense, saying (opinion, p. 418), that

he did not "seek to interpose any of the defenses pointed out as open to him upon the former hearing, but stands boldly on his attack upon the constitutionality of the act, and by a proceeding unknown to our practice."

After reviewing the construction of the statute given by the Supreme Court of Florida, this Court said in holding the statute to be unconstitutional (pp. 422-424):

> "Thus construed, and as applied in this case, we think Sec. 2677 is repugnant to the 'due process of law' provision of the Fourteenth Amendment, which requires at least a hearing, or an opportunity to be heard, in order to warrant the taking of one's property to satisfy his alleged debt or obligation; and in our opinion the other sections do not adequately supply the defect.
>
> * * * * *
>
> "*The suggestion that because, under Secs.* 1624 *and* 1625, *a hearing upon pertinent questions of fact may be had at the instance of the alleged stockholder after the execution issues and before interference with his possession or his property right, therefore plaintiff in error, having been at liberty in this proceeding to raise meritorious questions, is not 'within the class who may justly complain' will not withstand critical analysis.* (Italics ours.)
>
> "The statute mentions no classes, and the state court merely distinguished between those who complain and those who do not. Against one and all, execution may be issued without notice or hearing; the judgment against the corporation, and the record of stockholdings and stock subscriptions found upon the books of the corporation, being treated as conclusive against those named as stockholders. If a person against whom execution is thus issued as for an unpaid stock subscription does not happen to receive notice, extra-officially, or receiving it makes no objection, his property is taken in satisfaction of the cor-

poration's debt—manifestly without due process of law. But, it is said, plaintiff in error is not within that class; he in fact learned of the execution before his property was sold or even his possession was disturbed, and he had an opportunity for a hearing in the present proceeding as to all questions upon which his liability depended. The fallacy of this is that it ignores the issue of law raised by the petition of plaintiff in error, and substitutes an issue of fact for which he was not summoned and which he has not consented to litigate. *To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. Rees v. Watertown,* 19 Wall. 107, 123." (Italics ours.)

See also *In re Ziebold,* 23 Fed. 791 (C. C., D. Kan., 1885), where the court, in discussing the essentials of due process, said at page 793:

> "* * * Nor can a person be condemned without an opportunity to be heard and make his defense, although he may be guilty."

The want of jurisdiction by the notary is not cured by reason of the fact that the judge to whom application for discharge may be made after imprisonment may have jurisdiction to commit. *Pennoyer vs. Neff, supra* (95 U. S. 714, 728):

> "* * * Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when ren-

> dered, will always remain void: it cannot occupy the doubtful position of being valid if property be found, and void if there be none. * * * *The contrary is the law: the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently.*"

The following quotation from *People ex rel. McDonald vs. Leubuscher et al.*, 54 N. Y. S. 869, 879, 34 App. Div. 577, 590 (1898), is apposite:

> "* * * It is idle to say that the power to commit one to prison under such circumstances does not directly touch the liberty of the person who is confined there by virtue of it. A power which can impose upon any citizen the necessity to give information about his most private affairs in a matter in which he is not at all concerned, at the peril of imprisonment if he refuses, certainly affects his liberty in an eminent degree. It will not do to say that he may relieve himself of the imprisonment by answering the question. Whenever one is committed for refusal to perform an act he can get free by doing it; but no court has ever suggested that fact as a reason for sustaining the commitment. The fact that he is compelled involuntarily to perform a certain act, or to subject himself to imprisonment necessarily affects his liberty. He is therefore entitled to the protection of that article of the constitution which prescribes that no man shall be deprived of his liberty without due process of law."

The arbitrary edict of the notary is immediately executed, and deprives the witness of his liberty for an indeterminate period without due process of law, unless he assumes the burden of seeking his discharge by affirmative action. Whatever right to a judicial hearing is

given by Ohio law, "It is not the right to appear and make defense (before a competent tribunal) when it is most valuable and efficient; it is a right to defend after judgment and conviction." *Meyers et al. vs. Shields, supra* (61 Fed. 713, 724). In *Callan vs. Wilson*, 127 U. S. 540, 555 (1888), this Court, in commenting upon laws which gave the defendant the right of trial by a jury in the appellate court "as if the case had originated therein," quoted with approval the following statement by Mr. Justice Blatchford in *In re Dana*, Fed. Cases No. 3,554, 7 Benedict 14:

> "* * * In my judgment, the accused is entitled, not to be first convicted by a court and then to be acquitted by a jury, but to be convicted or acquitted in the first instance by a jury."

In like manner it is not due process of law in this case for an incompetent officer first to convict and imprison the witness without notice or trial, and it does not become "due process" merely because the witness may subsequently secure his discharge by affirmative action on his part in an independent proceeding.

In *Meyers et al. vs. Shields, supra* (61 Fed. 713), it was held the grant of a right of review by court proceedings would not validate the determination of an officer which in itself was void for due process of law. The question was whether the county auditor was disqualified to make a valid assessment by placing omitted property on the duplicate list for taxation, because the statute gave him a fee of four per cent of the amount recovered.

The court held that the statute was unconstitutional and void under the Fourteenth Amendment, because of the direct pecuniary interest of the officer, and further,

because the entry was made on the tax duplicate without notice or trial; that "unless the taxpayer assumes the burden of removing the cloud upon his title and the lien upon his property by affirmative action, they stand as a menace to his credit and right of possession of his property * * *. This is not the right to appear and make defense at the time when it is most valuable and efficient. It is a right to defend after judgment and conviction" (p. 724).

E. These Cases Are Not Within That Class Of Proceedings Where Due Process Permits Postponement Of Judicial Inquiry

The appellee cited below general statements to the effect that due process of law is not necessarily judicial process and argued inferentially that the right of judicial review might be postponed until after commitment without offense to the requirements of due process.

It is true that what is due process of law "varies with the subject matter and the necessities of the situation"; *Moyer vs. Peabody*, 212 U. S. 78, 84 (1909); that it does not in all cases mean proceedings in court; that there are exceptions to the requirement of notice and hearing by the administrative board or official to the party whose rights and liabilities are to be affected, and that in certain cases summary action without hearing before the particular board or official is authorized, and, in such cases the "mere postponement of judicial inquiry is not a denial of due process if the opportunity given for the ultimate judicial determination of the liability is adequate." *Phillips et al., Executors, vs. Commissioner*, 283 U. S. 589 (1931). See also *Murray*

vs. Hoboken Land & Imp. Co., 18 How. (U. S.) 272 (1855); *Davidson vs. New Orleans,* 96 U. S. 97 (1877).

But these exceptions to the usual course of due process of law have no application to the instant proceedings. "Under ordinary circumstances due process of law implies a formal judicial proceeding." *Held vs. Crosthwaite et al.,* 260 Fed. 613, 625 (C. C. A. 2nd, 1919). Summary action without hearing, and postponement of judicial inquiry, constitute due process of law *only in the assertion of the rights of the public against the property of the individual in the exercise of the public police power or the imposition of burdens upon his property for the public use, where the nature of the subject matter requires summary action;* as in matters of taxation and revenue and in the exercise of the power of eminent domain, where it is essential that government needs be immediately satisfied; *Murray vs. Hoboken Land & Imp. Co., supra; Springer vs. United States,* 102 U. S. 586 (1880); and in the exercise of the public police power where public health or public safety require the immediate destruction of private property; *Phillips et al., Executors, vs. Commissioner, supra* (283 U. S. 589).

That the subject matter of these proceedings is not within the exceptional class where due process of law does not imply a formal judicial proceeding is evident from the authorities. Thus the headnote of *Davidson vs. New Orleans,* 96 U. S. 97 (1877), where the question concerned the taxing power, states:

> "The court has heretofore decided that due process of law does not in all cases require a resort to a court of justice *to assert the rights of the public against the individual, or to impose burdens upon his property for the public use.*" (Italics ours.)

Phillips et al., Executors, vs. Commissioner, supra (283, U. S. 589), states the application of this exception to the usual course of due process of law. There in upholding the provision of the Revenue Act authorizing summary enforcement of the liability of transferees of assets of a corporation, it was said (at pp. 596, 597):

> "*Where only property rights are involved,* mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. (Citations.) Delay in the judicial determination of property rights is not uncommon where it is essential that government needs be immediately satisfied. For the protection of public health, a state may order the summary destruction of property by administrative authorities without antecedent notice or hearing. (Citations.) Because of the public necessity, the property of citizens may be summarily seized in war-time. (Citations.) And at any time, the United States may acquire property by eminent domain, without paying, or determining the amount of the compensation before the taking. (Citations.)" (Italics ours.)

If it is borne in mind that the question here considered concerns only the right of a party to cross examine his adversary in connection with the assertion of private claims by private persons, it will sufficiently distinguish the cases which involve the police power, or the right of eminent domain or of taxation.

The cases upon which the appellee based his contentions that due process of law is not necessarily judicial process, concern the grant of judicial or *quasi*-judicial powers to administrative officials or bodies created by the legislature. They encompass the vast field of ad-

ministrative law. But the procedure of administrative agencies must satisfy the requirements of due process of law. By whomever the power is exercised, it must be exercised *in the manner prescribed by the law of the land.* Due process of law, in this respect, applies to all branches of government, and to all characters of public officers. *Davidson vs. New Orleans, supra* (96 U. S. 97, 107); *Noble vs. Union River Logging Railroad Co.,* 147 U. S. 165, 173 (1893).

The procedure must include notice and opportunity to be heard. In the case of *Chicago, Milwaukee and St. Paul Railway Co. vs. Minnesota,* 134 U. S. 418, 457 (1890), Mr. Justice Blatchford said in relation to the determination of an administrative body:

> "* * * No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; * * *."

See also *Federal Trade Com. vs. Curtis Pub. Co.,* 260 U. S. 568 (1923); *Kwock Jan Fat vs. White, as Commissioner,* 253 U. S. 454, 458 (1920); *New York, etc., Co. vs. McCall et al.,* 245 U. S. 345, 348-349 (1917); *Interstate Commerce Commission vs. Louisville and Nashville R. R. Co.,* 227 U. S. 88, 91 (1913); *Interstate Commerce Com. vs. Baltimore, etc., Co.,* 226 U. S. 14 (1912); *Tracy vs. Comm. of Internal Revenue,* 53 F. (2d) 575, 578 (C. C. A. 6th, 1931).

The principle here involved is admirably stated by Mr. Justice Field in *The Railroad Tax* cases, 13 Fed. 722, 752 (C. C., D. Cal., 1882) when he says:

"* * * But whatever the character of the proceeding, whether judicial or administrative, summary or protracted, and whether it takes property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established, by a weight of authority absolutely overwhelming than that notice and opportunity to be heard are indispensable to the validity of the proceeding."

F. Assuming That The Notary, Who Is An Administrative Or Executive Officer May Be Given The Power To Punish As For Contempt, Then The State Law Must At Least Provide Fair Opportunity For Submitting To The Determination Of A Court Upon Its Own Judgment As To Both The Facts And The Law Before Commitment, Fundamental Questions Involving The Jurisdiction Of The Notary And Claims of Deprivation Of Rights Guaranteed By The Federal Constitution

A party asserting deprivation of rights secured by the Federal Constitution is deprived of due process of law if no fair opportunity is provided by state law for submitting the question to the determination of a judicial tribunal upon its own judgment as to both facts and law. *Ohio Valley Water Co. vs. Ben Avon Borough*, 253 U. S. 287 (1920); *Crowell vs. Benson*, 285 U. S. 22 (1932).

In applying the principle of the *Ben Avon* case and *Crowell vs. Benson, supra*, to the instant proceedings,

we do not broadly raise the question of the validity of the grant of judicial or *quasi*-judicial powers to administrative officers or tribunals. We would observe the distinction expressed in *Crowell vs. Benson, supra* (285 U. S. 22, 50-51), in considering the validity of Federal administrative determinations under the Federal Constitution:

> "As to determinations of fact, the distinction is at once apparent between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments. * * *
>
> "* * * The present case does not fall within the categories just described but is one of private right, that is, of the liability of one individual to another under the law as defined."

The usual case involving the validity of the grant of such power to an administrative officer or tribunal concerns the exercise of a public right or function, *e. g., Phillips et al., Executors, vs. Commissioner, supra* (283 U. S. 589); *Tracy vs. Comm. of Internal Revenue, supra* (53 F. (2d) 575); *Stanton vs. Tax Commission,* 114 O. S. 658 (1926), which are recent important pronouncements of these courts on administrative agencies. The present proceedings concern only the rights of private persons, the enforcement of the purported right of the adversary party to obtain evidence in advance of trial to support his private claim to property.

It is submitted that the power to commit in connection with the performance of the judicial functions of government is essentially the exercise of judicial power.

In view of the right of the witness called for examination to refuse to answer incompetent questions, the exercise of the power to commit for refusal to answer calls for a determination of the rights of the parties upon the facts and the law. That calls for a *judicial determination* and the exercise of judicial power.

Numerous decisions hold that the power to punish for contempt is the highest exercise of judicial power, and may not be conferred upon an inferior ministerial officer. *Interstate Commerce Commission vs. Brimson,* 154 U. S. 447 (1894); *Kilbourn vs. Thompson,* 103 U. S. 168 (1880); *In re Mason,* 43 Fed. 510 (D. C., Minn., 1890); *Burns vs. Superior Court,* 140 Calif. 1, 73 Pac. 597, 602 (1903); *Langenberg, Sheriff, vs. Decker,* 132 Ind. 600, 31 N. E. 190 (1892); *People ex rel. McDonald vs. Leubuscher, supra* (54 N. Y. S. 869, 34 App. Div. 577); *Ward Baking Co. et al. vs. Western Union Telegraph Co.,* 200 N. Y. S. 865, 205 App. Div. 723 (1923); *In re Sims,* 54 Kan. 152, 37 Pac. 135, 136 (1894); *In re Huron,* 58 Kan. 152, 48 Pac. 574, 575 (1897).

In *Interstate Commerce Commission vs. Brimson, supra* (154 U. S. 447), the headnote reads in part as follows:

> "The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for *final* determination. Such a body could not, under our system of government, and *consistently with due process of law,* be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment." (Italics ours.)

In speaking of the inability of the commission itself to compel a witness to answer or produce the books, papers, etc., the court said:

> "* * * Except in the particular instances enumerated in the Constitution, * * * *the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States, can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises.*" (P. 485.) (Italics ours.)
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> * * * * *
>
> "* * * Of course, the question of punishing the defendants for contempt could not arise before the Commission; for, in a judicial sense, there is no such thing as contempt of a subordinate administrative body. No question of contempt could arise until the issue of law, in the Circuit Court, is determined adversely to the defendants and they refuse to obey, not the order of the commission, but the final order of the court." (Pp. 488, 489.)

In *Kilbourn vs. Thompson, supra* (103 U. S. 168), the court, in denying the power of Congress to impose a fine or imprisonment on a witness who refused to testify before that body, without the determination of a competent judicial tribunal, said:

> "* * * No general power of inflicting punishment by the Congress of the United States is found in that instrument. It contains in the provision that no 'person shall be deprived of life, liberty, or property, without due process of law,' the strongest implication against punishment by order of the legislative body. It has been repeatedly decided by this court, and by others of the highest authority, that this means a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed by rules of law previously established. * * *." (P. 182.)

In re Mason, 43 Fed. 510 (D. C., Minn., 1890), held, following *Kilbourn vs. Thompson, supra*, that a commissioner of the circuit court had no power in the criminal proceeding before him to arrest a witness who refused to obey a subpoena. The court said (P. 515):

> "To arrest and punish for a contempt is the highest exercise of judicial power, and belongs to judges of courts of record, or superior courts. * * * This power is not, and never has been, an incident to the mere exercise of judicial function, and such power cannot be upheld upon inferences and implications, but must be expressly conferred by law."

The court said also (P. 516):

> "It is stated that the commissioner had the authority to arrest the petitioner for the purpose of taking him before some court having authority to punish for contempt, and that he was about to do this. I can see no distinction between the power to decide that a contempt has been committed, and forthwith arrest the person, and the authority to punish. The arrest is for the purpose of punishment, and if the commissioner had no power to punish he could not deprive the petitioner of his liberty, however short the time might be."

The words "due process of law" have the same meaning in the Fifth and Fourteenth Amendments of the Federal Constitution. *Twining vs. New Jersey, supra* (211 U. S. 78, 100-101); *Hurtado vs. California, supra* (110 U. S. 516, 535).

In *In re Huron, supra* (58 Kan. 152, 48 Pac. 574), the court, in holding that a notary public had no power to commit a witness for contempt under statutes purporting

to confer that power upon him, aptly describes the anomalous situation of the notary under the law of Ohio:

> "* * * While the taking of testimony is incidental to a judicial proceeding, the notary, in taking the deposition, is not required to determine the relevancy and competency of testimony, but simply writes and authenticates the testimony given, with such objections as the parties desire to make. He is not designated as a court, nor clothed with the usual paraphernalia of such a tribunal. A court is said to be a tribunal organized for the public administration of justice at a time and place prescribed by law. No provision is made for pleadings, or the issuance of process by a notary, except to subpoena a witness to give his testimony. If the witness refuses to be sworn or to testify, and is deemed subject to a charge of contempt, no rules are prescribed for a trial before the notary, nor is specific provision made for obtaining evidence in order to determine whether such witness is actually guilty of contempt. Up to the time of the refusal of the witness, at least, the notary was only an executive officer, and was exercising executive power. There is no such thing as contempt of executive authority which is punishable. While an executive officer might be constituted a court, judicial power cannot be conferred on him as merely ancillary to the exercise of purely executive power." (Pp. 575, 576.)

The Ohio statutes as construed by the Supreme Court of that state present a strange anomaly in that a notary public, who has no "judicial power" but is a mere ministerial or executive officer, yet punishes summarily for contempt, which is generally said to be the highest exercise of judicial power. The discerning Common Pleas judge before whom the case of *In re Rauh, supra* (65 O. S. 128), was tried, while feeling himself

bound by the decisions of the Supreme Court of Ohio, observed in his opinion reported in 8 O. N. P. 142 (1901) at page 145:

> "Such an anomaly in our jurisprudence requires correction. Depositions under our law are a proper mode of testimony, and either the officer, to whom is delegated the power of taking them, ought to be well versed in the law, and have the power of passing upon the competency of the testimony, or the road to the opinion of a court upon such competency ought not to lead through a jail."

It is questioned whether under *Interstate Commerce Commission vs. Brimson, supra* (154 U. S. 447), and *Kilbourn vs. Thompson, supra* (103 U. S. 168), the inquiry whether a witness is bound to answer a particular question or to produce books or documents can be committed to the notary public for *final* determination even though the Ohio statutes had conferred upon the notary jurisdiction to determine the competency and relevancy of the same, but it is not necessary to decide that point in these proceedings. While the notary public in the taking of testimony performs a function which is incidental to a judicial proceeding, it can not be maintained and the Supreme Court of Ohio has not held that he does or can accord the witness that judicial hearing to which the latter is entitled by the Federal Constitution. He acts wholly independently of the court in which is pending the case in which the deposition is being taken. If he has any discretion at all to refuse the importunities of counsel desiring commitment, he acts as his will dictates, unhampered by the requirements of due process of law.

It must be concluded, therefore, that the statutes of

Ohio under which the notary acted in this case and the proceedings of the notary against the petitioners, are violative of the due process clause of the Federal Constitution in failing to provide for notice and opportunity to be heard before *a competent tribunal before commitment and imprisonment.*

3. THE OHIO STATUTES HERE INVOLVED, AND THEIR OPERATION IN THESE CASES, FURTHER VIOLATE THE REQUIREMENTS OF DUE PROCESS IN THAT THEY PURPORT TO PERMIT THE COMMITMENT AND IMPRISONMENT OF WITNESSES BY AN OFFICER DISQUALIFIED BY REASON OF HIS DIRECT, PERSONAL, SUBSTANTIAL PECUNIARY INTEREST IN THE TAKING AND PROLONGING OF THE DEPOSITIONS

We proceed, in discussing this contention, from the premise that under the theory of the Ohio statutes the notary has the power and discretion, personal and arbitrary though it be, to decide whether or not he will commit and imprison a witness as for an unlawful refusal to give evidence.

Of course if Ohio General Code Section 11512, relating to commitment, is a mandatory statute, which the Supreme Court of Ohio strongly intimates, without so holding, because "it is not necessary so to do in this case," then a notary is without even a personal, arbitrary discretion, but must follow the dictates of counsel even though he is personally convinced that the witness' refusal is lawful, and his presence and part in the proceed-

ings are mere formalities, "and the sham and deceptive proceeding had better be omitted altogether."

Under such a construction of the statute our present contention would have to be directed to the disqualification of counsel for one litigant to imprison the adverse litigant and witnesses without a hearing, rather than to the disqualification of the notary. A statute which would in terms vest in one private litigant, through his counsel, the power by personal fiat to commit and imprison his adversary or witnesses as for contempt upon refusal to give evidence, no matter how irrelevant it might be or how frivolous the alleged cause of action might appear, notwithstanding that the witness might lawfully refuse to testify upon immaterial or irrelevant matters, and relegating one so imprisoned to relief by *habeas corpus*, would be so plainly vicious and flagrantly violative of due process, that we apprehend little argument would be required to demonstrate its unconstitutionality.

Yet in operation, if not in legal theory, the statutes under consideration approach this result, and would seem to be subject to the same vice as the statutes declared to be unconstitutional in the cases of *In re Sims, supra* (54 Kan. 1, 37 Pac. 135), and *In re Ziebold, supra* (23 Fed. 791).

It is obvious that if the appellants had been compelled to subject themselves to the range of testimony indicated in the subpoena *duces tecum* and as might be ordinary in a case of this nature, the fees of the notary would amount to several hundreds of dollars with an upward range limited only by the amount of testimony he could compel them to give. Not only the goodwill of his employers, and the hope of future employment, but

also the notary's compensation in these cases depended upon his committing and imprisoning the witnesses as a means of coercing them to give evidence. He was disqualified by a direct, pecuniary, substantial, personal interest to exercise any power he might have to determine whether he would or would not commit the witnesses. It is true that he was assured of *some* compensation regardless of his rulings. A few folios might be taken and transcribed and a few dollars earned if he refused to order a witness to answer or refused to commit; but *substantial* compensation and the extent of it depended upon commitment of the witnesses.

As we have stated, he not only did comply with the request of his employers but he did it without arriving at any deliberate judgment of his own upon the legal question as to whether the evidence demanded was material upon which depended a determination as to whether the refusal was unlawful.

This was not an exceptional but the usual and normal operation of the statute in which the Supreme Court of Ohio found nothing repugnant to the statutory scheme.

Under the rule announced by this Court in *Tumey vs. State of Ohio*, 273 U. S. 510 (1927), the statutes of Ohio and their operation in the respects just noted denied due process of law to these appellants.

The *Tumey* case declared unconstitutional the statutes of Ohio concerning offenses against state prohibition laws which were triable without a jury before a mayor, who, when he convicted, but not otherwise, received his fee in costs and thus secured a substantial income. There the court said (P. 523):

"* * * But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in this case.

"The mayor of the Village of North College Hill, Ohio, had a direct, personal, pecuniary interest in convicting the defendant who came before him for trial, in the twelve dollars of costs imposed in his behalf, which he would not have received if the defendant had been acquitted. This was not exceptional, but was the result of the normal operation of the law and the ordinance. * * *"

The rule of the *Tumey* case is applicable to a ministerial or administrative officer as well as to a court. *Meyers et al. vs. Shields, County Treasurer, supra* (61 Fed. 713). In that case the court held that the Ohio statute under which the auditor was charged with the duty of placing omitted property on the tax list, receiving a fee of four per cent of the delinquent taxes which he might thereby assess, denied due process of law and said (P. 725):

"The next important question to be determined is whether the auditor is disqualified to make a valid assessment as the conclusion of the proceedings before him because of his direct pecuniary interest in the result. If he makes a finding against the taxpayer and enters an assessment upon the tax duplicate, the statute gives him four per cent upon the amount so recovered. If he fails to discover any property omitted from the taxpayer's return, he receives no compensation for his services. Because of this direct reward if he finds against the taxpayer, and of no reward if he finds in his favor, is he disqualified, and are the pro-

> ceedings therefore invalid? The object of all legislation pertaining to judicial or *quasi*-judicial proceedings is to furnish an impartial and wholly disinterested tribunal before which such proceedings are instituted and carried forward. It is to carry out the constitutional guaranty that no man shall be deprived of life, liberty or property without due process of law that the chief safeguard of a disinterested judge, jury, referee or arbitrator is so carefully provided by legislation and protected by judicial scrutiny."

It would be a hypertechnical distinction that in the *Tumey* case the mayor would receive a fee only if he convicted. The difference in the cases of the mayor in the *Tumey* case receiving nothing or $12 of costs (page 523) and of the notary in this case faced with the choice of a negligible fee, or yielding to the temptation of the prospect of a substantial fee perhaps amounting to several hundreds of dollars and without upward limit if the witness could be coerced to testify by the exercise of the drastic power of summary imprisonment, shows the danger to be more perilous in the latter case.

It is the interest of the officer "in the controversy to be decided" (P. 522), his interest "in the resolving of the subject matter which he had to decide" (P. 524), which disqualifies him, however, and in what form the interest arises and regardless of the precise point to be decided so long as the motive of self-interest clashes with the right of the citizen to an impartial determination. No evidence need be introduced to show partiality or unfairness in fact. The vice is the existence of the motive to act in self-interest. Thus it was said in the *Tumey* case (P. 532):

> "* * * It is certainly not fair to each defendant, brought before the mayor for the careful and judicial consideration of his guilt or innocence, that the prospect of such a loss by the mayor should weigh against his acquittal. * * *
>
> "* * * There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it; but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law."

The interest of the notary which influences him to make a decision against the witness is so direct and of such a substantial character that we are confident no parallel can be discovered. Employed by the examining party to take and transcribe testimony, he turns one folio over another, each bringing him 25c or double that amount, if both parties will require copies. Finally an impasse is reached, conflicting claims of right are asserted and he suddenly assumes the role of sole arbiter of a judicial controversy, wielding a power strange to his occupation and depending upon a choice of mere exercise of will, with no compulsion of duty to seek to make a just determination. His personal interest calls for a recognition of the fact that his true place is that of the servant and not the arbiter. Shall he act as directed by his employer and by ordering commitment coerce the giving of further evidence or shall he resist the dictates

of his employer and risk dismissal in the proceedings then going on and consequent loss of compensation, and also jeopardize his chance of future employment since he is hired by those who want answers and not by those who resist, and shall he make this self-sacrifice to no purpose since another notary more subservient than he may doubtless be found to do the bidding of the employer?

As was said in *Meyers et al. vs. Shields, supra* (61 Fed. 713) (P. 726), in regard to proceedings for the assessment of taxes where due process permits of more summary action:

> "* * * A statute which confers upon an officer, chosen solely with reference to other duties, the power to conduct a quasi-judicial proceeding, which in every stage of its progress is summary, and in its findings arbitrary in the highest degree, and which makes this officer, combining the functions of judge and jury, partial and biased, because directly interested by reason of the very liberal reward which flows to him if he decides against the taxpayer, is a gigantic and perilous stride towards withdrawing from the citizen every principle of constitutional protection heretofore deemed secure and perpetual. * * *"

The objection to the disqualification of a notary was raised in accordance with the state practice and in *In Re George Sage*, 24 O. C. C. (N.S.) 7 (1915), and was considered by the Supreme Court of Ohio and decided, adversely to our contentions, upon its merits.

4. THE OHIO STATUTES HERE INVOLVED AND THE OPERATION THEREOF, AS APPLIED TO THE FACTS IN THE BEVAN AND KOEHRMAN CASES, CONSTITUTE UNREASONABLE SEARCH AND SEIZURE AND DEPRIVE THESE APPELLANTS OF DUE PROCESS

As to the appellants Bevan and Koehrman, the subpoenas *duces tecum* served upon them were so broad and sweeping in their terms, and compliance with the order for the production of all the books, records and documents called for, and the forceful seizure thereof by the plaintiff for incorporation in the deposition and the consequent loss of possession thereof by the appellants for an indeterminable period until trial of the action, would be such a hardship and so burdensome and prejudicial and so unreasonable, as to constitute a deprivation of property without due process of law.

These subpoenas are set forth in the record (*Bevan*, 44; *Koehrman*, 43). A reading of them will disclose their all inclusive and unreasonable scope.

In *Hale vs. Henkel*, 201 U. S. 43, 76, 77 (1905), this Court said:

> "We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd* case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena *duces tecum*, against which the person, be he individual or corporation, is entitled to

protection. Applying the test of reasonableness to the present case, we think the subpoena *duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made, and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different states in the Union.

"If the writ had required the production of all the books, papers and documents found in the office of the MacAndrews & Forbes Company, it would scarcely be more universal in its operation, or more completely put a stop to the business of that company. Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpoena. Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms. *Ex Parte Brown*, 72 Missouri 83; *Shaftsbury vs. Arrowsmith*, 4 Ves. 66; *Lee vs. Angas*, L. R. 2 Eq. 59."

In *Consolidated Rendering Company vs. Vermont*, 207 U. S. 541 (1907), the question whether an unreasonable search and seizure of books and documents might not also be a deprivation of due process of law guaranteed under the Fourteenth Amendment was considered; this Court saying (P. 551):

> "Counsel insisted before us in discussing the second objection that the failure to give an opportunity to be heard why the books should not be produced deprived it of due process of law guaranteed under the Fourteenth Amendment. Without discussing the question whether this matter comes within the meaning of due process of law, we may say that the objection to the statute is not borne out by its text. * * * So long as a hearing is given before any proceeding is concluded to enforce the production of the papers, due process of law is afforded. *Simon v. Craft*, 182 U. S. 427; *Wilson v. Standefer*, 184 U. S. 399, 415; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 349."

But under the Ohio statutes the proceeding is to be, and in these cases it was, concluded and here imprisonment was imposed and was in effect, to enforce the production of the books and writings demanded before any hearing was or could be had.

See also *Crocker-Wheeler Co. vs. Bullock*, 134 F. 241 (C. C., S. D. Ohio, W. D., 1904).

While this Court held in *Weeks vs. United States*, 232 U. S. 383, 398 (1914), that the Fourth Amendment is not directed to the individual misconduct of state officers, this Court has not yet held that the guaranty of due process in the Fourteenth Amendment does not protect the citizen against unreasonable search and seizure at the

hands of the state, accompanied by a dispossession of the owner of the property seized, in this case, books, records and papers. If, therefore, the due process clause is held applicable it seems clear that the subpoenas and the operation of the statutes now in question, offend against its provisions.

V.

CONCLUSION

We submit that in the respects above pointed out Ohio General Code Sections 11510, 11511 and 11512, contravene and violate Section 1 of the Fourteenth Amendment to the Constitution of the United States; that they are unconstitutional and void, and that the judgment of the Supreme Court of Ohio in these cases should be reversed, and the discharge of the appellants from custody should be ordered.

Respectfully submitted,

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APPENDIX A

Ex parte C. N. Bevan.
Ex parte John W. Koehrman.
Ex parte Robert A. Stranahan.

SYLLABUS

1. Judicial power is not exercised by a notary public, during the taking of depositions, in committing to jail witnesses who refuse to answer questions, and in attaching and committing to jail witnesses who disobey the order of their subpoena.

2. The general assembly did not violate any provision of the federal or state constitution in the enactment of Sections 11510, 11511 and 11512, General Code, in delegating such power to notaries public. (DeCamp v. Archibald, 50 Ohio St., 618, and Benckenstein v. Schott, 92 Ohio St., 29, approved and followed.)

3. A witness committed by a notary public, under Sections 11510, 11511 and 11512, General Code, has his remedy under Section 11514, General Code, and is not denied due process of law. Where the witness is a party and is being examined as upon cross-examination under the statute, the further right to test the relevancy or competency of the questions and to demand his privilege, is preserved to him in the trial court.

4. The right of a party to an action to examine the adverse party as upon cross-examination under Section 11497, General Code, vests as soon as summons is served on such party as provided by Section 11526, General Code. The fact that a co-defendant has not been served with summons, does not furnish any reason why the party served should not submit to such examination, since the party plaintiff may proceed under Section 11299, General Code.

5. No ground for refusal to appear before a notary public and testify, is afforded officers of a corporation by the fact that the petition in the action, in which it is sought to take the depositions of such officers as upon cross-examination, is claimed to be demurrable, or that the action was not brought within the time provided by law, or that a party plaintiff has been guilty of laches.

Syllabus

6. The claim that a notary public has such an interest in the taking of depositions as disqualifies him to act, is untenable, and the case of Tumey v. Ohio, 273 U. S., 510, has no application whatever.

7. In an action charging fraudulent conspiracy by the officers of a corporation, because of the tendency toward liberality in cases of this character, the range of the testimony is wide, and subpoenas *duces tecum*, which command that the entire correspondence file, records and documents of such corporation for many years back, be produced before the notary public by the officers of the corporation, to be used in connection with the giving of their depositions as upon cross-examination, are not so broad and sweeping as to be violative of due process, and do not constitute unreasonable searches and seizures.

8. When a personal representative of a decedent's estate refuses to bring an action for the collection of assets, an heir, legatee or devisee may bring the action and make such personal representative a party defendant.

(Nos. 23652, 23653 and 23654—Decided January 25, 1933.)

STATEMENT OF THE CASE

Error to the Court of Appeals of Lucas County.

[1] These are proceedings in error to review the respective judgments of the Court of Appeals of Lucas county, Ohio, made and entered in the above-entitled cases. An intelligent consideration of the issues involved necessitates a comprehensive statement. In order to make it comprehensive, some time and much space have been consumed.

[2] These judgments respectively deny original applications by the plaintiffs in error for discharge from the custody of the sheriff of Lucas county. The plaintiff in error, C. N. Bevan, was held under a commitment issued by a notary public for his refusal to answer material questions, refusal to answer any further questions

of any character, and refusal to produce material books or records, pursuant to a subpoena *duces tecum,* in the course of the taking of his deposition in the suit of *Clara Sielcken-Schwarz v. The Woolson Spice Company et al.,* pending in the Common Pleas Court of Lucas county. The plaintiffs in error, John W. Koehrman and Robert A. Stranahan, had respectively been arrested under attachments issued by the same notary, upon their refusal to appear and give their depositions in the same case, in response to subpoenas personally served upon them.

[3] The material facts are as follows: On June 2, 1932, Clara Sielcken-Schwarz, as widow and sole residuary legatee of the late Hermann Sielcken, filed her petition in the common pleas court of Lucas county, Ohio, against the Woolson Spice Company, an Ohio corporation, of which the plaintiff in error, C. N. Bevan, is secretary and treasurer; against plaintiffs in error, John W. Koehrman and Robert A. Stranahan; against Franklin H. Biggs, Marion M. Miller and Frank D. Stranahan; against Ammi F. Mitchell and Leroy E. Eastman, as administrators of the estate of William Brigham, deceased; and against the Irving Trust Company, a foreign corporation, as executor of the last will and testament of Hermann Sielcken, deceased.

[4] The petition charges that the defendants Koehrman and Biggs and said Brigham fraudulently conspired together to take advantage of the absence in Germany of Sielcken (president and controlling stockholder of the Woolson Company), where he had gone on the business of the company, and where he had been detained by his

last illness and the exigencies of the World War, to oust Sielcken as president, and to wrongfully acquire control of the corporation and manipulate and exploit it in their own interests; that thereafter said Koehrman, Biggs and Brigham, in association with Robert A. Stranahan and Frank Stranahan, aided and abetted by the Woolson Spice Company, fraudulently conspired together to acquire for a grossly inadequate price the stock formerly held by Sielcken and then held by his estate; that the fraudulent conspiracy was carried on by such individual defendants, taking advantage of the control of the corporation, wrongfully acquired by them, to misrepresent the financial condition, business and prospects of the Woolson Company; that such fraudulent misrepresentations were communicated to the executor, and to all prospective purchasers of the stock; and that as a result of this wrongful and fraudulent conspiracy the individual defendants, aided and abetted by the Woolson Spice Company, obtained the stock of the Sielcken estate for a grossly inadequate price.

[5] The petition asks to have the stock so obtained restored to the estate, together with all dividends paid thereon since its fraudulent conversion.

[6] The petition alleges that the fraud was not discovered by the plaintiff, sole residuary legatee, until 1931, and was not discovered by the executor prior to that time. The petition further sets forth that since the executor has failed and refused to bring the suit on request of the plaintiff, such executor is therefore joined as a party defendant.

[7] On the same day the petition was filed, summons was duly issued and served upon all of the defend-

ants except Marion M. Miller, who could not be found within the county and who has not been served. On the same day, after service of summons, notice to take depositions on June 6, 1932, was served on the Common Pleas defendants and subpoenas *duces tecum* were served on the witnesses, Koehrman and Bevan. No proceedings were had on this notice because prior to June 6th counsel for the Common Pleas plaintiff were served with a motion to quash the notice to take depositions and the subpoenas *duces tecum,* and to enjoin the taking of depositions. This motion came on for hearing before the Common Pleas Court of Lucas County, Ohio, on June 6, 1932, and, at the suggestion of the court an agreement was reached between counsel for the Common Pleas plaintiff and chief counsel for the Common Pleas defendants, and for these plaintiffs in error, that the taking of depositions should be postponed until June 13th. Pursuant to that agreement new notices to take depositions on June 13th were served on the Common Pleas defendants, subpoenas *duces tecum* upon the plaintiffs in error Bevan and Koehrman, and ordinary subpoenas upon the plaintiff in error Robert A. Stranahan and upon Frank Stranahan.

[8] At 9:30 a.m., on June 13th, the hour fixed for taking the depositions, the witness Bevan appeared, but without any of the books and papers called for in his subpoena. The witnesses, Koehrman and Stranahan, disregarded their subpoenas and failed to appear. On the failure of three of the witnesses summoned to appear and the failure of the witness, Bevan, to make any compliance with his subpoena *duces tecum,* the notary ad-

journed the hearing until 2:00 p.m., of the same day, and ordered Bevan to produce at that time the books and records described in his subpoena. Prior to this adjourned time for the taking of these depositions, a supplemental motion to quash the new notices and subpoenas, and to enjoin the taking of depositions in the Common Pleas suit was filed in the Common Pleas Court. At 2:00 p.m., on June 13th, being the time to which the taking of the depositions had been adjourned, Koehrman and Stranahan again failed to appear. Bevan appeared and was duly sworn and proceeded to answer a few questions as to his name and occupation. He was then asked a series of questions, subsequently found to be material by the Court of Appeals for Lucas county, Ohio, and in each instance, upon being ordered to answer by the notary, he refused to do so, making no claim of privilege, and giving as his only reason that he was advised by counsel not to answer. Bevan also refused to produce any of the books, records or documents required by his subpoena *duces tecum*. Finally Bevan stated that he would answer no further questions of any kind or character whatsoever, and he again refused to produce any of the books, records or documents described in his subpoena *duces tecum*.

[9] Thereupon the notary adjudged that said questions were material, and that said books, papers and documents were material and properly described, and issued to the sheriff of Lucas county, Ohio, a commitment directing him to arrest and commit the said witness to the county jail until he should testify. The witnesses Koehrman and Stranahan having failed and refused to

appear in obedience to their subpoenas, the notary issued writs of attachment for each of them, commanding the sheriff of Lucas county, Ohio, to attach each of them and bring them before the notary forthwith "as well to answer the State of Ohio for said contempt in disobeying said subpoena as to give his testimony in the action."

[10] No arrests were made under the commitment or writs until 9:10 a.m., on June 14th, at which time the sheriff's office was advised by counsel for the plaintiffs in error that Bevan, Koehrman and Robert A. Stranahan were then in the Lucas county courthouse, ready to be arrested. A technical arrest was then made, and three applications for discharge from illegal imprisonment or petitions for writs of *habeas corpus,* were immediately filed with the Court of Appeals of Lucas county, Ohio. The applications or writs were granted at once, before the sheriff had an opportunity to produce the witnesses Koehrman and Stranahan before the notary, and all were immediately released on their own recognizances, pending hearings on their applications or petitions.

[11] Thereupon counsel for the plaintiffs in error and common pleas defendants dismissed without prejudice, and without any hearing, the motion and supplemental motion to enjoin the taking of depositions in the suit which had been filed in the common pleas court.

[12] On the morning of June 15, 1932, the plaintiffs in error filed in the Court of Appeals of Lucas county, Ohio, amendments to their respective applications or petitions, in which they raised the constitutional questions now sought to be brought before this court.

[13] The original applications or petitions, and the amended applications or petitions, were heard by the

Court of Appeals of Lucas county on June 15th and 16th, and after hearing all evidence offered by counsel on the legality of the restraint of the respective witnesses, lengthy arguments of counsel, and the submission of briefs, that court on June 21, 1932, held that the Common Pleas plaintiff was entitled to take the depositions of these witnesses at once; that the subpoenas *duces tecum* called for material, books and papers, and were not too broad; that the questions asked the witness Bevan were material; that he was guilty of contempt for refusing to produce the books and papers; and that the witnesses Koehrman and Stranahan were legally attached for disobeying their subpoenas.

[14] On June 22nd the Court of Appeals for Lucas county, Ohio, ordered the applications dismissed and the applicants remanded to the custody of the sheriff of Lucas county. On the same day motions for a new trial in the Court of Appeals of Lucas county were overruled. Petitions in error were at once filed in this court by plaintiffs in error, and on June 25th respective applications for stays of execution were addressed to Judge Kinkade of this court. After a full hearing, Judge Kinkade overruled the applications. Similar applications were presented to the Court of Appeals of Lucas county on June 27th, and on June 29th these applications for stays were likewise overruled by that court.

[15] Messrs. Tracy, Chapman & Welles, Messrs. Marshall, Melhorn, Marlar & Martin, Mr. Harry S. Bugbee, Mr. Stuart S. Wall, Mr. Crary Davis and Mr. Thomas J. Lynch, for plaintiffs in error.

[16] Messrs. Baker, Hostetler, Sidlo & Patterson, and Messrs. Fraser, Hiett, Wall & Effler, for defendant in error.

OPINION

[17] Stephenson, J. These three cases were consolidated and submitted together, as the same alleged controlling questions arise in each case. There will be no further statement of fact in this opinion, other than is absolutely necessary in order to apply the law, as the court interprets it.

[18] It is assumed that the depositions in question were being taken before a regularly appointed notary public in pursuance of notice as provided by statute, as no question was raised along these lines.

[19] Stranahan was served with an ordinary subpoena and Bevan and Koehrman were served with subpoenas *duces tecum.*

[20] No complaint is made as to the service of the subpoenas. It is contended that the subpoenas *duces tecum* "were so broad and sweeping in their terms as to be violative of due process and to constitute unreasonable searches, and seizures, in addition to calling for incompetent and immaterial evidence."

[21] As bearing upon this particular phase of the case, *it is significant* that no question of privilege was raised.

[22] Stranahan and Koehrman disobeyed the order of their subpoenas and failed to appear. Bevan appeared, was sworn, answered the preliminary questions as to name and residence, refused to answer further questions, and refused to produce any of the books, records and documents described in his subpoena *duces tecum,* giving as his reason therefor that he "was acting upon the advice of counsel," which, of itself, in a case

of this character, is no reason at all. Attachments were issued and served on Stranahan and Koehrman. Brushing aside the preliminary proceedings, all three of them were arrested and committed to jail until they "should testify." Thereupon applications were made to the Court of Appeals for their release. It would be of little moment whether the application was made under favor of Section 11514, General Code of Ohio, or whether it was in the form of *habeas corpus*, except that the United States Circuit Court of Appeals of the Sixth Circuit has held substantially that this statute provides a method for judicial review of the action of the notary. *Bevan v. Light, Sheriff*, (C. C. A.), 61 F. (2d), 1019.

[23] The Court of Appeals heard the applications of all three, dismissed their petitions and they were thereupon automatically remanded to the custody of the sheriff of Lucas county; and this court is asked, in this proceeding, to reverse the Court of Appeals and discharge plaintiffs in error from custody.

[24] Practically all the statutes empowering notaries public to take depositions and commit any one violating their lawful orders, are attacked.

[25] The administration of justice would be seriously impeded had not the General Assembly made some provision for the taking of depositions. As a part of the instrumentality for taking depositions, the Legislature created the office of notary public and made it appointive. There was reason for this enactment. A notary public, above all officers, should not be under any obligation to the electorate of his county. A notary public is appointed by the governor, on the certificate of the

common pleas judge of the county for which he is appointed, which judge must have personal knowledge of his good moral character and his ability to perform the duties of the office, or ascertain same by an examination prescribed by the rules of court.

[26] No requirement as to fitness is required of a justice of the peace. If the individual who is a candidate for the office of justice of the peace in his township secures the greater number of votes, he is justice of the peace, regardless of fitness, and he is a judicial officer with power to "hear and determine" and undoubtedly with power to commit for contempt of his court.

[27] Can it be said that the Legislature has no authority to delegate the power to commit to a notary public, notwithstanding his fitness, just because he has no power to "hear and determine?"

[28] Our forebears, with uncanny wisdom, gave us the legislative, executive and judicial functions of government, and intended that they should operate as "checks and balances." During our formative period, the courts, federal and state, viewed with jealousy any attempt on the part of Congress or a state Legislature to delegate the powers inherent in one branch of government to another. Our rapid expansion made necessary the creation of many new offices and they were created, probably too many of them; but had not the courts relaxed to some extent the rule requiring the powers of government to be kept sacredly separate, we would have had many more of them.

[29] It would not be necessary to go beyond the confines of Ohio to find scores of instances wherein one

branch of government has been invested with the powers of another. This departure had to be made as a matter of public exigency.

[30] A notary public is a ministerial officer, as that term has been understood so long that "the memory of man runneth not to the contrary." Some worth-while authorities insist that the word "ministerial" means nothing, as applied to an officer—that our officers are legislative, executive and judicial. Under this strict nomenclature we must hold that a notary public is an executive officer, clothed with such power as the Legislature, within its constitutional limitations, saw fit to delegate to him.

[31] Is the power to commit, delegated to notaries public, a judicial function? We think not. It is so circumscribed by legislative enactment that there is little room remaining within which to exercise the only judicial function, if it by any stretch of the imagination could be called a judicial function, whether he will or will not commit.

[32] That is not all. We are not so sure that the section under which commitment by a notary is authorized is not a mandatory statute, notwithstanding the language used is directory.

[33] Section 11512, General Code, provides that the notary "may fine" or "may imprison" for disobedience of the order of a subpoena or refusal to testify. While language is helpful in determining whether a statute is mandatory or directory, it is by no means conclusive. The true test is the legislative intent. What is the pur-

pose of the statute? What did the Legislature intend that it should accomplish?

[34] The purpose of depositions is threefold: First, to obtain the testimony of witnesses beyond the jurisdiction of the court; second, to perpetuate testimony; and, third, to operate as a bill of discovery.

[35] The Legislature evidently sought to provide a means whereby a litigant's rights would be preserved in a case the exigencies of which would prevent him from producing his testimony in court in the regular way; to compel the production of testimony that might be forever lost; and to afford an opportunity to the litigant to secure evidence of facts necessary to make out his case, which evidence was peculiarly within the knowledge, or if documentary, in the possession and control of his adversary.

[36] Under these enactments the litigant is entitled to these rights as a matter of law. He undertakes to assert them. Notices are regularly served to take depositions of the officers of an adversary corporation. Subpoenas are regularly served. One officer appears in obedience to his subpoena, and refuses to testify. Two other officers refuse to appear. The litigant requests the notary to fine or commit the recalcitrant witnesses under such circumstances, and the notary flatly refuses to either fine or commit—must the litigant stop here and proceed anew before another notary or can he not resort to a court of record and by mandamus compel the notary to do his duty?

[37] The witness is given the right to have the assessment of his fine or his commitment inquired into

by a court of competent jurisdiction. Is the door of the law closed to the litigant?

[38] We are not holding Section 11512, General Code, to be a mandatory statute, as it is not necessary so to do in this case.

[39] The plaintiff in the action in which it was sought to take these depositions was not at all modest in her demands. The subpoenas *duces tecum* did call for the production of a mass of testimony, but it must be remembered that this is an action alleging fraudulent conspiracy, and, from the allegations of the petition, the range of the testimony was necessarily large.

[40] The allegations of this petition are sufficient to authorize an inspection of all records, documents and correspondence of the Woolson Spice Company from the time Hermann Sielcken became connected with the corporation until his death. This would include evidence of inducement whereby he was encouraged to connect himself with the corporation, if such evidence existed, as well as evidentiary matter since his death that lent light to the alleged fraudulent transactions during his lifetime.

[41] In the absence of any question of privilege, we do not regard the scope of these subpoenas as unreasonably comprehensive, or that they constitute unlawful search and seizure.

[42] Clara Sielcken Schwarz as widow and sole residuary legatee of Hermann Sielcken, deceased, upon the refusal of his personal representative to institute the action, had full right and capacity to file and maintain the action brought by her. To hold otherwise would be

to place heirs, legatees and devisees at the mercy of capricious administrators, executors and trustees. On this proposition we are content with the authorities cited by the learned Court of Appeals which heard the case: 24 Corpus Juris, 797, Section 1981; 11 Ruling Case Law, 262, Section 297; 22 L. R. A. (N.S.), 458, note; and 20 Ann. Cas., 96.

[43] Whether the petition is demurrable, or the action is barred by the statute of limitations, or Clara Sielcken Schwarz should not prevail in her suit because of laches, furnish no plausible pretext, and certainly no defense to Bevan, Koehrman and Stranahan for the disobedience of the orders of their subpoenas, in the face of Section 11526, General Code, which provides, in substance, that depositions may be taken at any time after the service of summons.

[44] The right to examine these relators, either orally or by deposition, as upon cross-examination, is statutory, and its exercise does not necessarily constitute a "fishing expedition." Neither of these sections is in contravention of the federal or state Constitutions.

[45] The fact that all parties defendant were not served with summons when their depositions were sought to be taken can make no difference so far as the relators are concerned, if they have been so served.

[46] The contention that the notary who committed the relators was disqualified because of interest is not tenable, and does not come within the purview of Tumey v. Ohio, 273 U. S., 510, 47 S. Ct., 437, 71 L. Ed., 749, 50 A. L. R., 1243.

[47] The review of the action of the notary in committing relators as provided by Section 11514, General Code, afforded them due process. In addition, the right and opportunity to object to any and all testimony taken by the notary, as being irrelevant, incompetent, or privileged, was preserved to them in the trial court, and they had due process of law.

[48] It has been heretofore held by this court that a notary public, in committing a witness to jail for refusing to answer questions, and in issuing an attachment for a witness who disobeys the order of his subpoena, does not exercise judicial power, and we see no good reason why we should depart from this long-established rule: *DeCamp v. Archibald,* 50 Ohio St., 618, 35 N. E. 1056, 40 Am. St. Rep., 692; *Benckenstein v. Schott, Sheriff,* 92 Ohio St., 29, 110 N. E. 633.

[49] These cases are likewise sufficient answer to the claim that Sections 11510, 11511 and 11512, General Code, are violative of the state and federal constitutions in denying due process of law.

[50] We find no prejudicial error in the record of any of these cases, and the judgment of the Court of Appeals in each and all of them is affirmed.

Judgments affirmed.

Day, Allen, Jones and Matthias, JJ., concur.

Weygandt, C.J., and Kinkade, J., not participating.